84-611

No.

Supreme Court, U.S.
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ALEXANDER L. STEVAS,
CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1984

ROBIN DOOLEY and PATRICK MATZ, PETITIONERS

v.

JEROME REISS, KEN MC ALPINE, MIKE MANLEY, RANDY WORRELL, DALE WILCOX, and STEPHEN MARKS

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QUESTIONS PRESENTED

1. Whether 42 U.S.C. 1983 may be interpreted so that a successful conspiracy in a federal court proceeding which actually prevents Section 1983 litigants from calling percipient witnesses may be said not to have deprived a Section 1983 litigant of a federal right under Section 1983.

2. Whether 42 U.S.C. 1985(2) may be interpreted so that a necessary element of stating a claim under Section 1985(2) is the use of "force, intimidation, or threat?"

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

Robin Dooley and Patrick Matz petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit in this case.

OPINION BELOW

The opinion of the Court of Appeals (App. A, infra, 1a-18a) is reported at 736 F. 2d 1392.

JURISDICTION

The judgment of the Court of Appeals (App. B, infra, 19a-20a) was entered on July 10, 1984. This Court's jurisdiction is invoked under 28 U.S.C. 1254(1).

STATUTES INVOLVED

Section 1 of the Ku Klux Klan Act of April 20, 1871, as amended, 42 U.S.C. 1983, provides, in pertinent part:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

Section 2 of the Ku Klux Klan Act of April 20, 1871, as amended, 42 U.S.C. 1985(2), provides, in pertinent part:

> If two or more persons in any State or Territory conspire to deter, by force, intimidation, or threat, any party or witness in any court of the United States from attending such court, or from testifying to any matter pending therein, freely, fully, and truthfully, or to injure such party or witness in his person or property on account of his having so attended or testified, or to influence the verdict, presentment, or indictment of any grand or petit juror in any such court, or to injure such juror in his person or property on account of any verdict, presentment, or indictment lawfully assented to by him, or his being or having been such juror [(3) the party so injured or deprived may have an action for the recovery of damages occasioned by such injury or deprivation, against any one or more of the conspirators]. 1/

1. The emphasized portions set forth the portion of the Statute on which appellants' claim was based.

STATEMENT

On December 1, 1980, appellants resided in a house in Anaheim, California. Based on an alleged anonymous telephone complaint to the Anaheim Police Department that there was "heavy foot traffic" at the residence, Anaheim police officers concluded that such traffic constituted the basis for a suspicion that illegal narcotics activities were taking place at the residence and placed it under surveillance on approximately 18 occasions from August 1980 to December 1, 1980. During and in furtherance of said surveillance, the officers wrote down the license plate numbers of all vehicles observed near the house. One such vehicle was registered to one Becky Bitter, who had, but no longer, lived at the residence. The officers turned up a then-two-year-old warrant for Bitter's arrest for failure to appear to answer charges on a thirty-dollar parking ticket. Armed with the warrant for Bitter, the officers

raided the residence on the pretext of arresting Bitter. The officers were advised at the door that Bitter did not live there and that if the officers wished to enter they should obtain a search warrant. The officers entered the residence and held the appellants, and others, at gunpoint for approximately one hour while conducting a full-scale search of the residence. The officers left and no criminal charges were preferred against any persons.

Shortly thereafter, appellants filed an action under 42 U.S.C. 1983 against the officers involved in that incident (officers Reiss, McAlpine, Manley, and Worrell). That action first was tried in October 1982, and a mistrail was declared after three days of trial.

That action again was tried in August 1983, and this time the jury returned a verdict in favor of appellants and against all the officers for fifty thousand dollars in compensatory damages and seventy thousand dollars in

punitive damages. During the course of this trial, it was revealed that the officers and their attorney, Marks, had, respectively, lied under oath in answers to interrogatories by stating that no police reports of the incident existed, and misled the court by knowingly submitting the perjurious interrogatory answer to appellants' counsel and the court. Also, it was revealed that Wilcox, who was a superior police officer, knew of and participated in the withholding of the reports which existed.

The reports contained the names of four percipient witnesses to the incident which served as the basis for a spurious claim by the police that appellants were narcotics dealers. That spurious claim went to the jury, but appellants were unable to locate or to subpoena these four persons to attend the trial because after the year and one-half which had elapsed since the reports were prepared and the time the information of their existence was

uncovered, they could not be located. Thus, appellants were deprived of any opportunity to call these persons as witnesses to attempt to disprove the police allegations that these four persons had provided the police with information that appellants were narcotics dealers, because the defendants and their counsel wilfully had concealed the existence of the police reports which listed their names and addresses. (It should be noted that when the reports were turned over pursuant to a court order, the names of the witnesses were deleted by the police. When asked for the reason for the deletion, the police and their counsel contended that the persons all were minors whose identities the police wished to protect. When the unredacted reports were ordered turned over, it became apparent that only one of the four persons was a minor.)

The jury's verdict was set aside in December 1983 on the ground that the court had not

properly instructed the jury on the issue of whether or not a police officer may enter a residence to conduct a search on the basis of an arrest warrant.

On May 14, 1984, on the day of the third trial, the parties settled the action for one hundred sixty-six thousand dollars. (The Court of Appeals' recital of the fact that the action was tried a third time and resulted in a verdict is based on facts outside the Court Of Appeals' record and is incorrect.)

Based on the perjurious interrogatory answer and defendants' involvement in covering-up the existence of the police reports and identities of the witnesses, this action was filed against the police officers, their superior officer, and their legal counsel.

This action was dismissed by the court on the ground that the connection between the alleged wrongful conduct and the alleged violation of appellant's rights was too attenuated and

therefore could not serve as the basis for a claim on which relief could be granted.

The Court of Appeals affirmed the dismissal on somewhat different grounds. It held that (1) no claim was stated under Section 1983 because appellants could point to no federal right of which they had been deprived and (2) "force, intimidation, or threat" was necessary for one to state a claim under Section 1985(2).

This Petition followed.

REASONS FOR GRANTING THE PETITION

To paraphrase from E. Barrett Prettyman's excellent article, "Petitioning the United States Supreme Court--A Primer for Neophytes" (U. Va. L. Rev. 51:582, 1965), there are three reasons for the granting of this Petition:

1. There has been a faulty statutory construction that will affect many cases;

2. Public officials have used methods which are alien to our American system of justice; and

3. The opinion below is at odds with previous assumptions and will operate to cause serious unwanted results.

Appellants are cognizant of the fact that the Supreme Court does not sit as a court of errors, but rather sits to resolve important issues of federal law.

The fundamental civil rights laws which govern the conduct of law enforcement officers throughout this Country and which provide for

remedies for those who allege and prove that their civil rights have been violated, have been interpreted in such a way so as to pervert their meaning, invite illegal and unethical conduct, and impugn the integrity of the federal courts.

Specifically, Section 1983 has been interpreted, to use the sports metaphor, by the use of the principle "no harm, no foul." The Court of Appeals reasoned that no violation of Section 1983 had occurred because "The attempt [to deprive appellants of a jury trial] ultimately failed." 736 F. 2d at 1394. That statement is incorrect and employs faulty logic.

First, the attempt did not fail: in fact, appellants were deprived of the testimony of the percipient witnesses whose identities were withheld by the defendants' concealment of the police reports. Appellants were deprived of a jury trial with full presentation of evidence

and witnesses in violation of their rights under the Seventh Amendment and Sections 1983 and 1985(2). Even if, arguendo, damages were a necessary element of a civil rights claim (and that is not the case, Gomez v. Toledo, 446 U.S. 635 [1980]), appellants were damaged by being prevented from calling the witnesses whose identities were concealed, and thereby were prevented from impeaching the police officers' false testimony based on matters allegedly gotten from these witnesses by the police.

Second, Section 1983 contains no requirement that the violation of one's federal rights to a trial of a civil rights claim be based on a wholly-successful wrongful plan or scheme. In fact, it is presumed that the violation of such a right need not be accompanied by any damage. Smith v. Wade, 103 S. Ct. 1625 (1983). The fact that defendants were only partly successful (the Court of Appeals argues that since appellants ultimately recovered monies in the

first action their rights were vindicated) does not operate to remove their actions from the proscriptive ambit of the applicable statute.

In essence, what the Court of Appeals has said is that persons who are caught violating Section 1983 may not be held liable for its violation, and that only persons who are not caught may be held liable. Such a formulation balks common sense and logic. Indeed, only one who is caught violating Section 1983 ever will be sued for its violation. That the violation is not wholly successful may not and should not be permitted to operate to foreclose liability on the parts of malefactors.

Specifically, Section 1985(2) has been interpreted to require as the basis for a claim under its provisions that "force, threat, or intimidation" be a condition precedent to its invocation. The court of Appeals' statement that the removal of those words from the present statute has no substantive import and

that the conditions required by those words still are a requirement of Section 1985(2) liability is wrong. It must be presumed that Congress in removing those words from the pertinent part of the statute intended to remove the requirements imposed by those words insofar as stating a claim under that portion of the statute is concerned. There is no basis in fact or in law for the Court of Appeals' interpretation of the removal of these words. Simply put, there is no requirement of "force, threat, or intimidation" in order to state a claim under the pertinent portion of Section 1985(2).

In the instant matter, public officials, police officers, and an officer of the court, their attorney, knowingly submitted perjurious answers to interrogatories, misled and continued to mislead opposing counsel and the court, lied as to the minority/majority status of witnesses whose identities and whereabouts

they covered up, and then escaped liability for their wrongful conduct because, the Court of Appeals says, they were not wholly successful and did not prevent appellants entirely from vindicating appellants' rights.

There are several reasons why this Court should look askance at what has transpired.

1. Two important federal statutes have been construed improperly.

2. The integrity of the federal court system has been violated and the violations have gone unredressed.

As this Court has stated: "[Section 1983] was enacted to deter real abuses by state officials in the exercise of government powers." Parratt v. Taylor, 451 U.S. 527, 550 (opinion of Justice Powell concurring in result) (emphasis in original). The abuses engaged in by the police and their attorney are precisely the kind of abuse at which the Ku Klux Klan Act of 1871 was directed: the

tampering, in the South, with judicially-created rights and with the judicial process. The construction given to Sections 1983 and 1985(2) operates to invite obstruction of justice in the federal courts: It is an open invitation to Section 1983 and 1985(2) defendants to obstruct justice in the federal courts because if they do so carefully, they never will be punished, and, if they are not so careful and are caught, then no claim will lie against them. Tampering with justice is invited by the Court of Appeals' opinion, and by the knowledge by the police and their attorney that they can do what they did and get away with it.

CONCLUSION

The Petition for a Writ of Certiorari should be granted because there has been a substantial faulty construction of federal statutes, public officials and an attorney who is admitted to practice in the federal court have engaged in

conduct in the federal courts which is alien to and abhorrent to our American system of justice, and the opinion of the Court of Appeals is at odds with previous assumptions and will operate to cause both serious unwanted results and a loss of respect for the federal judicial system.

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UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

FILED
JUL 10, 1984
PHILLIP B. WINBERRY
CLERK, U.S. COURT
OF APPEALS

ROBIN DOOLEY and PATRICK MATZ, Plaintiffs-Appellants, v. JEROME REISS, KEN MCALPINE, MIKE MANLEY, RANDY WORRELL, DALE WILCOX and STEPHEN MARKS, Defendants-Appellees.	)	No. 83-6439 DC# CV 83-5356-KN OPINION

Appeal from the United States District Court for the Central District of California David V. Kenyon, District Judge, Presiding Argued and Submitted May 9, 1984

Before: GOODWIN, SNEED, and ALARCON, Circuit Judges.

SNEED, Circuit Judge:

Horticulturally speaking, this case is a sucker springing from the roots of another civil rights action. Plaintiffs appeal from the district court's dismissal of their complaint alleging violations of 42 U.S.C. §§ 1983, 1985(2), and 1986. The complaint alleges that defendants conspired to commit perjury and to conceal evidence in a separate section 1983 action against certain defendants also involved in this case. The district court dismissed the complaint with prejudice for failure to state a claim and awarded attorney's fees to one of the defendants pursuant to 42 U.S.C. § 1988. We affirm in part and reverse in part.

I.

FACTS AND PROCEEDINGS BELOW

The allegations of the complaint must be considered as true for purposes of evaluating a motion to dismiss. See, e.g., Cruz v. Beto, 405 U.S. 319, 322 (1972). The parent case was Dellos v. Reiss (C.D. Cal. No. 80-5820),

brought by appellants Robin Dooley and Patrick Matz against four officers of the Anaheim, California, police department. Dooley and Matz, along with two other plaintiffs, sought damages for an allegedly unlawful search committed by police officers Jerome Weiss, Ken McAlpine, Mike Manley, and Randy Worrell (hereinafter, the "officers"). Dellos first went to trial on October 12, 1982. The district judge declared a mistrial, and the case went to trial a second time on August 9, 1983. The jury returned a verdict for plaintiffs in the amount of $50,000 in compensatory damages and $70,000 in punitive damages. On December 1, 1983, the district judge granted the defendants' motion for a new trial. After the third trial in Dellos, the jury awarded plaintiffs damages totalling $160,000.

In this case, Dooley and Matz essentially allege that the police officers, Police Captain Dale Wilcox, and attorney Stephen Marks

conspired to deprive plaintiffs of the testimony of four potential witnesses in the Dellos case. Plaintiffs in the Dellos action sent defendants interrogatories that asked if any police reports had ever been prepared in connection with the challenged search. The police officers answered the interrogatories by stating that no such reports existed and that a memorandum prepared by the officers for their attorney Stephen Marks was protected by the work product privilege. The answers were executed by three of the officers under penalty of perjury and signed by Marks.

In October 1981, one and one-half years after the officers answered the interrogatories, plaintiffs obtained various police reports and documents concerning the search that were in the possession of the officers at the time they signed their answers to the interrogatories. One of the reports contained the names of four persons who allegedly had

told the police that the plaintiffs were narcotics dealers.

During the August 1983 trial in the Dellos case, each officer testified that the answer given to the interrogatory was his answer, and officers Reiss, Manley, and Worrell testified that each had sworn to the correctness of the interrogatory. Each officer further testified that Captain Wilcox had told them that he would supply documents requested by the plaintiffs to Marks so the attorney could give them to the plaintiffs.

Plaintiffs allege, and we assume as true for purposes of evaluating the dismissal, that the officers and Marks knew that the police reports existed at the time the answers to the interrogatories were submitted. Wilcox, moreover, it is alleged, knew the documents existed and violated an affirmative duty by failing to provide them to the plaintiffs. By

the time the reports were disclosed, the plaintiffs could not locate the four witnesses.

The complaint filed by Dooley and Matz in this case alleges that the officers, Marks, and Wilcox conspired to commit perjury in the Dellos case, to withhold evidence from the plaintiffs, to obstruct and to impede justice in a United States district court, and to deprive plaintiffs of the right guaranteed by the Seventh Amendment to trial by jury. Dooley and Matz sought relief pursuant to 42 U.S.C. §§ 1983, 1985(2), and 1986 in an eleven count complaint. The district court dismissed each count with prejudice for failure to state a claim upon which relief can be granted. The district court also awarded attorney's fees to defendant Marks pursuant to 42 U.S.C. § 1988. We affirm in part and reverse in part.

the time the reports were disclosed, the plaintiffs could not locate the four witnesses.

The complaint filed by Dooley and Matz in this case alleges that the officers, Marks, and Wilcox conspired to commit perjury in the Dellos case, to withhold evidence from the plaintiffs, to obstruct and to impede justice in a United States district court, and to deprive plaintiffs of the right guaranteed by the Seventh Amendment to trial by jury. Dooley and Matz sought relief pursuant to 42 U.S.C. §§ 1983, 1985(2), and 1986 in an eleven count complaint. The district court dismissed each count with prejudice for failure to state a claim upon which relief can be granted. The distri t court also awarded attorney's fees to defendant Marks pursuant to 42 U.S.C. § 1988. We affirm in part and reverse in part.

II.

DISCUSSION

Our standard of review is very clear. District court dismissals for failure to state a claim upon which relief can be granted are questions of law and are freely reviewable by this court on appeal. See, e.g., Halet v. Wend Investment Co., 672 F.2d 1305, 1309 (9th Cir. 1982). A complaint should not be dismissed pursuant to Fed. R. Civ. P. 12(b) (6) unless "it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." Conley v. Gibson, 355 U.S. 41, 45-46 (1957).

A. Claims under Section 1983

To state a claim under 42 U.S.C. § 1983,[1] a plaintiff must allege that he was deprived of a federal right by a person acting under color of state law. E.g., Gomez v. Toledo, 446 U.S. 635, 640, (1980). Under the circumstances of this case the plaintiffs have failed to allege

the deprivation of a federal right. The district court therefore properly dismissed the section 1983 claims. The parent case has vindicated the plaintiffs' federal rights. For example, the contention that defendants denied plaintiffs their Seventh Amendment right to jury trial is false. Plaintiffs in fact received a jury trial in the Dellos lawsuit. Nor were plaintiffs deprived of a federal right by the defendants' attempt to conceal certain evidence. The attempt ultimately failed. A successful attempt by defendants to deprive a potential plaintiff of this right to bring a section 1983 action might well amount to an actionable deprivation of federally protected rights. See Logan v. Zimmerman Brush Co., 455 U.S. 422, 428-31 (1982) (cause of action is "property" protected by the Due Process Clause). Nonetheless, plaintiffs suffered no deprivation based on the belated disclosure of the police reports because they were not

prevented from pursuing, and in fact obtained, relief in the Dellos action. See Landrigan v. City of Warwick, 628 F.2d 736, 742 (1st Cir. 1980). Any damage by reason of delay in receiving vindication in the parent suit should be obtained in that suit when possible. This is not a case in which damage became apparent only after resolution of the parent suit. The absence of an actual deprivation implies that plaintiffs also failed to state a section 1983 claim based on the alleged conspiracy to conceal the reports. See id.; Hampton v. Hanrahan, 600 F.2d 600, 622 (7th Cir. 1979), rev'd. in part on other grounds, 446 U.S. 754 (1980).

Because no deprivation of a federal right, as encompassed by section 1983, is alleged, we do not reach the question whether any of the defendants acted under color of state law. Nor do we address the application

of Briscoe v. Lahue, 103 S. Ct. 1108 (1983), to the police officer defendants.

B. Claims Under Section 1985(2) and Section 1986

The plaintiffs fare no better under sections 1985(2) and 1986. Section 1985(2) consists of two parts: the first proscribes conspiracies to interfere with the administration of justice in federal courts;[2] the second applies to conspiracies to obstruct the course of justice in state courts.[3] The second part is inapplicable because the parent case did not involve proceedings in state court. On the other hand, under the first part of section 1985(2) it is not necessary to allege that the conspiracy was under color of state law or was motivated by racial or other class-based discriminatory animus. See Kush v. Rutledge, 103 S. Ct. 1483 (1983). Thus, it could be applicable.

Plaintiffs attempt to invoke this part by alleging that defendants conspired to "influence the verdict" of a juror, in violation of section 1985(2), by committing perjury and concealing evidence. The district court relied on Brawer v. Horowitz, 535 F.2d 830, 840 (3d Cir. 1976), and held that defendants' actions were "too remote" to have influenced a juror in violation of the statute. Thus, whether the district court properly dismissed the claims under section 1985(2) turns on what forms of influence are embraced within the phrase "influence the verdict."

Section 1985(2) originally was enacted as part of section 2 of the Civil Rights Act of 1871, 17 Stat. 13. The portion of section 2 that was later codified as the first part of section 1985(2) proscribed conspiracies "by force, intimidation, or threat to influence the verdict, presentment, or indictment, of any juror or grand juror in any court of the United

States. . ." The current language of section 1985(2) does not contain the phrase "by force, intimidation, or threat" immediately preceding the phrase "to influence . . .any juror or grand juror."[4] Plaintiffs rely on this omission to argue that a claim under section 1985(2) need not allege a conspiracy to influence a juror by "force, intimidation, or threat." This argument is meritless. The reclassification of section 2 of the 1871 Act into the three subsections that now are codified in section 1985 did not change the substantive meaning of the 1871 Act. Kush, 103 S. Ct. at 1487.

Plaintiffs' allegations that defendants conspired to commit perjury and to conceal evidence fail to state a claim for relief under section 1985(2).[5] The alleged actions did not influence or seek to influence a juror by force, intimidation, or threat. Even were we to accord substantive significance to the

omission of "by force, intimidation, or threat," we are confident that section 1985(2) does not embrace the forms of influence alleged by plaintiffs. Cf. Brawer, 535 F.2d at 840 (first part of § 1985(2) proscribes conduct that directly affects or seeks to affect parties, witnesses, or jurors). Because plaintiffs failed to state a claim under section 1985(2), the district court also properly dismissed the claim under section 1986.[6] See id. at 841.

C. The Award of Attorney's Fees to Defendant Marks

Nonetheless, defendant Marks is not entitled to recover attorney's fees under 42 U.S.C. § 1988. In a section 1983 case, fees may be awarded against an unsuccessful plaintiff only if his action is "meritless in the sense that it is groundless or without foundation." Hughes v. Rowe, 449 U.S. 5, 14 (1980). Although we affirm the district court's dis-

missal of the complaint, plaintiffs' claims under section 1983 and section 1985(2) present difficult issues not previously resolved by this circuit. This fact, and the requirement that we treat the allegations in the pleadings as true, implies that plaintiffs' action against Marks was not groundless. Cf. International Union of Petroleum and Industrial Workers v. Western Industrial Maintenance, Inc., 707 F.2d 425, 430 (9th Cir. 1983) (standard for fee award under Fed. R. App. P. 38 for frivolous appeal).

III.

CONCLUSION

We affirm the dismissal of all claims under sections 1983, 1985(2) and 1986 and the claim alleging deprivation of the right to trial by jury. We reverse the award of attorney's fees to defendant Marks. Each party shall bear its own costs on appeal.

AFFIRMED IN PART and REVERSED IN PART.

FOOTNOTES

1. Section 1983 provides in pertinent part:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

42 U.S.C. § 1983.

2. The first part of 42 U.S.C. § 1985(2) provides:

> If two or more persons in any State or Territory conspire to deter, by force, intimidation, or threat, any party or witness in any court of the United States from attending such court, or from testifying to any matter pending therein, freely, fully, and truthfully, or to injure such party or witness in his person or property on account of his having so attended or testified, or to influence the verdict, presentment, or indictment of any grand or petit juror in any such court, or to injure such juror in his person or property on account of any verdict, presentment, or indictment lawfully assented to by him, or of his being or

> having been such juror . . . [an action for damages will lie].

3. The second part of 42 U.S.C. § 1985(2) provides:

> [O]r if two or more persons conspire for the purpose of impeding, hindering, obstructing, or defeating, in any manner, the due course of justice in any State or Territory, with intent to deny to any citizen the equal protection of the laws, or to injure him or his property for lawfully enforcing, or attempting to enforce, the right of any person, or class of persons, to the equal protection of the laws; . . . [an action for damages will lie].

4. See supra note 2. The current language of § 1985(2) is taken verbatim from a revision of the 1871 Civil Rights Act authorized by Congress in 1874 as part of a general consolidation and collection of all federal statutes and laws in the revised statutes. Brawer, 535 F.2d at 837-38 & n.16. In the revised statutes, § 2 of the 1871 Act was reclassified into the three subsections that are now codified in § 1985. The minor grammatical changes made in the reclassification were not intended to alter the substantive meaning of the 1871 Act. Kush, 103 S.Ct. at 1487 & n.6; Brawer, 535 F.2d at 838 & n.16.

5. Our conclusion comports with Chahal v. Paine Webber Inc., 725 F.2d 20 (2d Cir. 1984), which held that a plaintiff had stated a claim for relief under § 1985(2) based on allegations

that an expert witness had been threatened with loss of employment if he continued his participation in a federal securities case. Chahal acknowledged that a claim under § 1985(2) based on witness intimidation must allege that a witness was deterred by "force, intimidation, or threat" from attending court or testifying freely. 725 F.2d at 23. The Second Circuit's opinion does not discuss the essential elements of a § 1985(2) claim based on interference with a federal juror.

6. Section 1986 provides in pertinent part:

> Every person who, having knowledge that any of the wrongs conspired to be done, and mentioned in section 1985 of this title, are about to be committed, and having power to prevent or aid in preventing the commission of the same, neglects or refuses so to do, if such wrongful act be committed, shall be liable to the party injured, or his legal representatives, for all damages caused by such wrongful act, which such person by reasonable diligence could have prevented; and such damages may be recovered in an action on the case; and any number of persons guilty of such wrongful neglect or refusal may be joined as defendants in the action.

42 U.S.C. § 1986.

JUDGMENT

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

ROBIN DOOLEY AND PATRICK MATZ, Plaintiffs-Appellants, V. JEROME REISS, KEN MCALPINE, MIKE MANLEY, RANDY WORRELL, DALE WILCOX and STEPHEN MARKS, Defendants-Appellees.	)	LODGED AUG 6 1984 NO. 83-6439 DC# CV 83-5356-KN

APPEAL from the United States District Court for the Central District of California.

THIS CAUSE came on the beard on the Transcript of the Record from the United States District Court for the Central District of California and was duly submitted.

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court, that the judgment of the said District Court in this Cause be, and hereby is AFFIRMED REVERSED. EACH PARTY SHALL BEAR ITS OWN COSTS ON APPEAL.

A TRUE COPY
ATTEST

Clerk of Court

by: _____
Deputy Clerk

APPEALS UPDATE SHEET
COMPLETED BY

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JULY 10, 1984

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NO.

IN THE

SUPREME COURT OF THE UNITED STATES

October Term 1984.

ROBIN DOOLEY and PATRICK MATZ,

Petitioners,

vs.

JEROME REISS, KEN MC ALPINE, MIKE MANLEY, RANDY WORRELL, DALE WILCOX, and STEPHEN MARKS,

Respondents.

RESPONSE TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

Respondent STEVEN MARKS respectfully prays that a writ of certiorari not be issued to review the judgment and opinion of the United States

Court of Appeals for the Ninth Circuit entered in this proceeding on July 10, 1984.

1. STATEMENT OF THE CASE

On August 19, 1983, the Plaintiffs-Petitioners (hereinafter collectively referred to as "Petitioners") initiated a civil rights action in the United States District Court for the Central District of California, seeking recovery under 42 U.S.C. §§ 1983, 1985(2). and 1986 (hereinafter the "Dooley action.") This action arose out of an earlier civil rights action against police officers for an alleged unlawful search of Petitioners' home (hereinafter the "Dellos action"). After two trials the Dellos action was resolved through settlement.

In the Dooley action, Petitioners allege that Respondent Marks,

the attorney for the police officers in the Dellos action, conspired to deprive Petitioners of the testimony of four potential witnesses. In the Dellos action, Petitioners propounded an interrogatory to the police officers which asked if any police reports had been prepared in connection with the challenged search. The police officers initially failed to disclose the existence of a police report in their answer. Petitioners claim that by the time they discovered the existence of the police report they were unable to locate four individuals named on the document, and were thereby denied an opportunity to call these potential witnesses.

In response to the Petitioners' Complaint in the Dooley action, Respondent Marks filed a Motion to Dismiss pursuant to Rule 12(b)(1) and (6) of the Fed. R.

Civ. P. On October 13, 1983, the Honorable David V. Kenyon, United States District Court Judge Presiding, granted Respondent Marks' Motion to Dismiss with prejudice. On July 10, 1984, the Court of Appeals for the Ninth Circuit affirmed the District Court's order in part and reversed in part. On September 10, 1984, the District Court spread the order upon the record. The subject Petition for Certiorari followed shortly thereafter.

2. REASONS WHY THE WRIT SHOULD NOT BE GRANTED

A. The Court Of Appeals Correctly Found No Deprivation Of Petitioners' Federal Rights

This Court has held, and the Circuit Courts are in uniform agreement, that in order to state a claim under 42 U.S.C. § 1983, the plaintiff must allege

that he has been deprived of a federal right. (Parratt v. Taylor, 451 U.S. 527, 535 (1981), Gomez v. Toledo, 446 U.S. 635, 640 (1980)).

In affirming the dismissal of Petitioners' section 1983 claims the Court of Appeals correctly found that Petitioners had failed to satisfy this requirement. Petitioners could not and cannot point to which constitutional or federal right they have been deprived of. The withholding of evidence, its concealment, and perjury of defendant witnesses with respect to a federal judicial proceeding does not reflect the violation of any federal or constitutional right.

Even accepting petitioners claims of conspiracy, no section 1983 claim can be maintained without an actual deprivation of rights. Villanueva v. McInnis, 723 F.2d 414, 418 (5th Cir.

1984), Landrigan v. City of Warwick, 628 F.2d 736, 742 (1st Cir. 1980), Hampton v. Hanrahan, 600 F.2d 600, 622, (7th Cir. 1979). Accordingly, Petitioners can maintain no section 1983 claim.

B. The Inability To Call Witnesses At Trial Does Not Constitute An Improper Influence On The Verdict Of A Jury Within The Meaning Of Section 1985(2)

Petitioners' claim that by willfully concealing evidence, Respondents conspired to improperly influence the verdict of a jury in federal court thereby violating 42 U.S.C. § 1985(2). The Court of Appeals dismissed this claim finding no influence on the jury. Petitioners contend that the Court of Appeals erroneously required a conspiracy to influence the jury verdict by "force, intimidation, or threat."

To understand why Petitioners' contention is fundamentally flawed, it is necessary to first review the history of section 1985. It was originally adopted as Section 2 of the Civil Rights Act of 1871. Section 2 of the 1871 Act contained one long paragraph proscribing numerous classes of conspiratorial activity. When Congress enacted the Revised Statutes in 1874, this paragraph was codified as Section 1985 and divided into three subsections.

As part of this reclassification, the phrase "force, intimidation or threat" was deleted from the clause dealing with the improper influence of juries but retained in the body of Section 1985(2). In Kush v. Rutledge, ____ U.S. ____, 103 S.Ct. 1483, 1487 (1983), this court noted that the "reclassification was not intended to

change the substantive meaning of the 1871 Act." Relying on Kush v. Rutledge, the Court of Appeals rejected Petitioners' argument that this deletion resulted in substantive changes to Section 1985.

In any event, the Court of Appeals did not hold that an allegation of "force, threat or intimidation" was a necessary requirement of a Section 1985(2) claim. Rather, the Court of Appeals simply determined that the facts alleged could not equate with 'influencing' the jury. This is the same result achieved by the Court of Appeals in Brawer v. Horwitz, 535 F.2d 830 (3rd Cir. 1976):

> "[W]e believe it wholly logical and reasonable that, in compiling the Revised Statutes, Secretary Fish's commission deleted the words ("force, intimidation, or

threat"), recognizing that juries can be 'influenced' as often and perhaps more effectively by positive inducments--such as money--as they can be negative inducements, including force, intimidation or threats. In our view, the deletion was not substantive, . . . but sought to clarify the congressional intent to reach all conspiracies to influence jurors directly."

Id. at p. 840.

The inability of a party to present evidence to a jury is not the type of influence encompassed by Section 1985(2). Accordingly, the Court of Appeals correctly affirmed the dismissal of Petitioners' section 1985(2) claim.

C. Petitioners Had The Right To Seek Redress For The Alleged Wrongdoing In The Dellos Action

Without stating so directly, Petitioners intimate in their opening brief that unless this Petition is granted they will be deprived of a remedy for the alleged wrongdoing of the Respondents. While it cannot be argued that litigants should not fabricate evidence or suppress incriminating documents, such wrongs are not within the ambit of the Civil Rights Acts and are adequately dealt with in present court rules and criminal prosecutions for perjury. (See, Rule 37(b)(2) of the Fed. R. Civ. P.; and Hampton v. Hanrahan, 600 F.2d 600, 641-642 (7th Cir. 1979).) The Civil Rights Acts were never intended to provide a remedy for

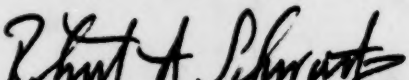
discovery abuses in the civil litigation process.

3. CONCLUSION

For these reasons, Respondent Marks respectfully requests that a writ of certiorari not be issued to review the judgment and opinion of the Court of Appeals.

Respectfully submitted,

ROBERT A. SCHWARTZ
LEWIS, D'AMATO, BRISBOIS & BISGAARD

By 
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